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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Matter of	)	
	)	GN Docket No. 93-252
Implementation of Sections 3(n) and 332 of the Communications Act	)	
	)	
Regulatory Treatment of Mobile Services	)	

REPLY COMMENTS OF RAM MOBILE DATA USA LIMITED PARTNERSHIP

RAM Mobile Data USA Limited Partnership ("RMD") hereby submits the following reply comments with respect to the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

First, a number of commenting parties have misconstrued the Congress' intent in using the terms "interconnection" and "functional equivalent" to draw a distinction between private and commercial mobile service providers, in amending Sections 3(n) and 332 of the Communications Act of 1934, as amended (the "Act"). As a result, many parties now urge upon the Commission a definition of commercial mobile service that is overly broad.

Second, by virtue of the fact that cellular providers are free to provide, on a common carrier basis, a broad array of ancillary services, many cellular commenters have concluded that all parties who offer such services must be classified as commercial mobile service providers. This conclusion is unwarranted.

Third, RMD replies herein to the comments of a number of parties relating to more discrete issues, including (i) that mobile service licensees should not have the flexibility to choose their regulatory status, (ii) that a non-interconnected service could, somehow, be considered a commercial mobile service, and (iii) that wide-area SMR licensees are presumptively commercial mobile service providers.

I. A NUMBER OF COMMENTING PARTIES HAVE FAILED TO GRASP THE SIGNIFICANCE OF THE TERMS "INTERCONNECTED" AND "FUNCTIONAL EQUIVALENT"

A number of parties are urging the Commission to define "commercial mobile service" so broadly that virtually every mobile service provider, with the exception of non-profit operations, would be included in the commercial mobile service category.[1] These parties, not surprisingly, are service providers who fall clearly in the commercial category themselves (*i.e.*, entities that provide—or represent providers of—conventional cellular telephone service, or offerings that, from the consumer perspective, are substantially identical to such service (*e.g.*, voice PCS and interconnected specialized mobile radio service of the variety offered by Nextel Communications, Inc., formerly Fleet Call, Inc.)). In short, the parties who now urge commercial mobile service status for nearly all mobile service providers are the very parties who were the focus of the regulatory parity legislation in the first place.

As RMD stated in its initial comments in this proceeding, Section 332 was designed for the sole purpose of placing providers of ordinary voice cellular telephone service on an equal regulatory footing with licensees who offer consumers services that are substantially similar to conventional cellular telephone service, but who have, heretofore, been regulated as private mobile providers.[2] Contrary to the comments of a number of parties in this proceeding, Congress never intended to place all mobile services, other than non-profits, in the commercial mobile service category. Thus, as Senator Inouye, Chairman of the Senate Communications Subcommittee, noted in his comments concerning the legislation, "providers of specialized mobile radio services that do not compete with cellular service are not intended to be covered under the definition of commercial mobile services."[3]

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1 See, *inter alia*, Comments of Pacific Bell and Nevada Bell at 10.

2 The intention of Congress to subject providers of both the mobile version of conventional telephone service and services functionally indistinguishable from such service to the same regulatory framework was evidenced as early as July 1992, when the Communications Subcommittee of the Senate Committee on Commerce, Science, and Transportation first held hearings to examine the erosion of distinctions between these services. See, *inter alia*, Statement of Kenneth M. Mead, Director, Resources, Community, and Economic Development Division of the U.S. General Accounting Office (Released July 1, 1992).

3 139 Cong. Rec. S 7913, S 7949 (June 24, 1993).

Similarly, in advocating an overly-broad definition of commercial mobile service, many commenting parties[4] found it convenient simply to ignore the example in the Conference Report which reveals that Congress intended the term "functional equivalent" to narrow, not expand, the commercial mobile service category.[5] Those few parties urging a broad definition of commercial mobile service who sought to make sense of the example argued that the service Congress described in the example does not fall within the literal definition of commercial mobile service because Congress did not specify that the service was a for-profit service.[6]

This argument is specious: if the service Congress described was non-profit, it would be impossible for that service to be the functional equivalent of a commercial service, as a non-profit service is, by definition, non-commercial (*i.e.*, private). As the Notice acknowledges, and as many commenters pointed out,[7] the example makes sense only if the service described satisfies the literal definition of a commercial mobile service but is regulated as private, nonetheless, because it is not the "functional equivalent" of a commercial service.

In their attempt to include all for-profit mobile service providers in the commercial mobile service category, however, many commenting parties lost sight of the Congressional intent underlying the interconnection requirement, focusing

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4 See, *inter alia*, Comments of Vanguard Cellular Systems, Inc.

5 The example is as follows:

> [t]he Commission may determine, for instance, that a mobile service offered to the public and interconnected with the public switched network is not the functional equivalent of a commercial mobile service if it is provided over a system that, either individually or as part of a network of systems or licensees, does not employ frequency or channel reuse or its equivalent (or any other techniques for augmenting the number of channels of communication made available for such mobile service) and does not make service available throughout a standard metropolitan statistical area or other similar wide geographic area.

H.R. Rep. No. 102-213, 103rd Cong., 1st Sess. (1993) ("Conference Report") at 496. By offering an example of a service provider that satisfies the literal definition of a commercial mobile service provider and then stating that the Commission could, nonetheless, find that such provider was private because it may not be the functional equivalent of a commercial mobile service provider, Congress intended the term functional equivalent to narrow the commercial mobile service category.

6 See, *inter alia*, Comments of US WEST, Inc. at 8.

7 See, *inter alia*, Comments of Geotek Industries, Inc. at 6-7.

exclusively on the for-profit element in discussing which services should be deemed commercial.[8] Section 332(d)(1) of the Act now provides that a mobile service will be classified as a "commercial mobile service" if it: (1) is "provided for profit," *and* (2) makes "interconnected service" available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public. Yet, many parties advocating an all-encompassing commercial mobile services definition offer no explanation as to why Congress included an interconnection requirement in the parity legislation.

As discussed above, and as many parties[9] correctly observed, the aim of the legislation is to establish regulatory parity between providers of conventional voice cellular telephone service and providers of services that are substantially similar to such service. In short, Congress was focusing on providers of the mobile version of plain old telephone service ("POTS"). Congress never intended to subject all mobile services to common carrier regulation. To capture this dichotomy, Congress used the term "interconnected" as a short-hand way to craft a regulatory distinction between providers of the mobile version of POTS (which would be subject to common carrier regulation) and providers of mobile services that are not like POTS (which would continue to be regulated as private carriers). By ignoring the interconnection requirement, therefore, commenters endorsing an expansive commercial mobile services category have obliterated the careful distinction Congress intended to draw between commercial and private mobile services.

II. THE ABILITY OF CELLULAR PROVIDERS TO OFFER ANCILLARY SERVICES DOES NOT SUBJECT ALL PROVIDERS OF LIKE SERVICES TO COMMON CARRIER REGULATION

Cellular service providers are presently permitted to offer on a common carrier basis a broad array of services that are ancillary to the provision of conventional cellular telephone service.[10] Some commenters, however, appear to believe that, simply because cellular providers are authorized to offer these services on a common carrier

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8 See, *inter alia*, Comments of Pacific Bell and Nevada Bell at 10.

9 See, *inter alia*, Comments of Roamer One, Inc. at 11.

10 See Report and Order, GEN. Docket No. 87-390, 3 FCC Rcd 7033 (1988). Additionally, many cellular commenters now urge the Commission to remove the current prohibition on the provision of dispatch services by cellular providers. See, *inter alia*,, Comments of Independent Cellular Network, Inc. at 3-4.

basis, these services are, *per se*, commercial mobile services.[11] Thus, by this logic, all providers of these services must be commercial and regulated as such.

In effect, therefore, these parties, contrary to Congressional intent, have re-defined commercial mobile service to mean any service that a conventional cellular provider is permitted to offer. In so doing, these parties have obliterated the statutory distinction between commercial mobile service and private mobile service, a distinction that, as the Congress made clear, turns on whether a mobile service provider offers, on a for-profit basis, interconnected service to the public.

III. OTHER ISSUES

In addition to the basic issues addressed above, a number of parties focused on more discrete issues, including (a) the ability of a mobile service licensee to choose its regulatory status, (b) the possibility that a non-interconnected service could, somehow, be considered a commercial mobile service, and (c) whether all wide-area SMR licensees offering their services pursuant to a single license, as presently envisioned by the Commission,[12] are presumptively commercial mobile service providers. Finally, McCaw Cellular Communications, Inc. ("McCaw") stretched its comments in this proceeding to assert that RMD had misused the regulatory processes of three states in connection with the provision by a number of cellular carriers to United Parcel Service ("UPS") of a nationwide automated tracking system.[13] As discussed below, such an assertion is untrue.

A. Regulatory Flexibility.

A mobile service licensee should have sufficient flexibility to choose its regulatory status (*i.e.*, private or commercial), including the ability to change that status during the license term. Further, RMD supports those parties who endorse a licensee's ability to provide simultaneously both commercial and private services pursuant to a

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11 See, *inter alia*, Comments of Vanguard Cellular Systems, Inc. at 11-12.

12 See First Report and Order and Further Notice of Proposed Rule Making, PR Docket No. 89-553, 8 FCC Rcd. 1469 (1993).

13 Comments of McCaw at 25-26, n.71.

single license,[14] provided, however, that adequate safeguards exist to prevent service providers from discriminating against their commercial mobile service customers by providing substantially similar services to other customers at significantly reduced rates on a private carrier basis. RMD opposes, therefore, those parties that would deny this flexibility to a licensee.[15]

Moreover, GCI's suggestion that the only adequate remedy available to the Commission against a licensee that incorrectly designates that it is private is license forfeiture[16] is entirely unwarranted. The Commission's application process (requirement to file FCC Forms 401 and 574), coupled with market forces, will provide the Commission with adequate information to ensure licensee compliance with Section 332 and the implementing rules and regulations.

Additionally, there is no compelling reason to create distinct frequency bands for providers of commercial and private mobile services. Such an approach would inevitably prove overly complicated and would hinder the natural development of the mobile services industry. RMD notes that there is ample Commission precedent for shared spectrum allocations between licensees operating in the same service under different regulatory schemes, including multiple address, satellite, and FM subcarrier services.

B. Regulatory Status of Non-Interconnected Services.

As RMD noted in its initial comments in this proceeding, a non-interconnected service, such as the service provided by RMD, must be deemed private. First, by virtue of the fact that the service is not interconnected, it does not meet the literal definition of a commercial mobile service. Second, given that the basis for commercial status is whether interconnected service is provided to the public, it cannot logically follow that a non-interconnected service is the functional equivalent of a commercial mobile service.

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14 See, *inter alia*, Comments of Pagemart, Inc. at 16.

15 See, *inter alia*, Comments of General Communications, Inc. ("GCI") at 2.

16 Id.

Some parties resist this logic and assert without any basis that RMD's non-interconnected service should be classified as a commercial service.[17] TDS, for example, asserts that RMD's service should be deemed commercial even if it is not "technically interconnected." TDS noted that paging—not surprisingly a service that TDS provides—should be classified as private because it is not considered to be an interconnected service for the purposes of Section 332.[18] While RMD has no opinion concerning the appropriate regulatory status of paging services, in the absence of a compelling argument grounded squarely in Section 332, RMD's non-interconnected service cannot be placed in the commercial mobile service category.

C. Regulatory Status of Wide-Area SMR Systems.

In discussing wide-area SMR licensees operating, as contemplated by the Commission, pursuant to a single license,[19] Nextel concludes that such licensees are presumptively commercial.[20] This conclusion is incorrect. At present, RMD is the only licensee that has constructed a wide-area 900 MHz SMR system. However, as discussed above, the fact that RMD is non-interconnected precludes it from being considered a commercial mobile service. For the reasons discussed extensively in two notice and comment proceedings[21] and in RMD's comments in PP Docket No. 93-253 (In the Matter of Implementation of Section 309(j) of the Communications Act Competitive Bidding), the Commission should adopt its proposal to allow existing 900 MHz SMR licensees to expand their SMR systems to provide service, under a single license, within their natural market boundaries. For the reasons discussed herein, such services should be deemed commercial only to the extent they are interconnected.

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17 See, *inter alia*, Comments of Telephone and Data Systems, Inc. ("TDS") at 14, and Comments of Nextel Communications, Inc. at 15-16.

18 Comments of TDS at 14-15.

19 See n.12, *supra*.

20 Comments of Nextel Communications, Inc. at 15.

21 See Further Notice, Notice of Proposed Rule Making, PR Docket No. 89-553, 4 FCC Rcd. 8673 (1989).

D. Comments of McCaw.

McCaw went out of its way in its comments in this proceeding to make the point that RMD had misused the regulatory processes of three states by filing petitions against McCaw and other cellular carriers involved in providing a nationwide automated tracking system to UPS.[22] In its petitions against the cellular carriers, RMD explained that these carriers, including McCaw, charge their respective local cellular customers three to eight times as much for essentially the same intrastate cellular service that they are now providing to UPS.

In sum, McCaw and the other cellular carriers have used the duopoly profits they earn from their cellular customers to cross-subsidize the rates they charge to UPS. This potential for cross-subsidization, predatory pricing, and customer discrimination offers ample support for the Commission, in the absence of structural and other safeguards, to continue to regulate providers of conventional cellular telephone service (and services similar to conventional cellular service) as commercial mobile service providers when they offer services that would otherwise be considered private mobile services under amended Section 332.

IV. CONCLUSION

Owing to a misreading of the Congressional intent underlying the terms "interconnected" and "functional equivalent," a number of the parties submitting initial comments in this proceeding urge upon the Commission an overly expansive definition of "commercial mobile service." The sole purpose of amended Sections 3(n) and 332, however, is to establish regulatory parity between providers of ordinary voice cellular telephone service and services that, from a consumer perspective, are substantially identical to such cellular service. Congress never intended to subject all mobile service providers to common carrier regulation.

Additionally, the fact that cellular providers are permitted on a common carrier basis to offer a broad array of ancillary services has no bearing on the regulatory status of other mobile service providers who offer these same services as part of their core business. Moreover, RMD urges the Commission to create a regulatory environment

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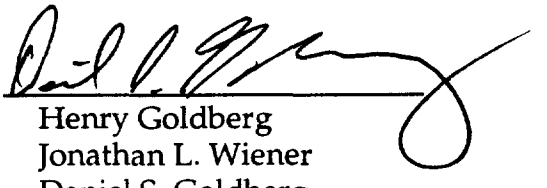
22 Comments of McCaw at 25-26, n.71.

that encourages, rather than impedes, the natural development of the mobile services industry. Accordingly, the Commission should permit licensees to choose their regulatory status (and to change that status without penalty or unnecessary regulatory burdens during the license term), as well as reject suggestions by some commenters to create distinct frequency bands for commercial and private mobile services. Likewise, a licensee should have the ability to provide simultaneously both commercial and private services pursuant to a single license, provided, however, that adequate safeguards exist to prevent service providers from discriminating against their commercial mobile service customers by providing substantially similar services to other customers at significantly reduced rates on a private carrier basis. Finally, the Commission should conclude that, under Section 332, a non-interconnected service is, by definition, a private service.

Respectfully submitted,

RAM MOBILE DATA USA
LIMITED PARTNERSHIP

By: 

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